Supreme Court, U.S.
FILED
MAR 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1417

In The

Supreme Court Of The United States

JANUARY TERM, 1986

STEPHANIE TYLER-BARCOMB and FREDERICK S. BARCOMB, JR.,
Petitioners,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

JOHN M. MASSAMENO
Assistant State's Attorney
Senior Appellate Attorney
Office of the Chief State's Attorney
Division of Criminal Justice
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373

Counsel of Record for Respondent

18 pp

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT'S EXTENSIVE CANVASS OF THE PETITIONERS CONCERNING THEIR WAIVER OF THE RIGHT TO SEPARATE COUNSEL WAS ADEQUATE UNDER THE SIXTH AMENDMENT.

II. WHETHER THE CONNECTICUT SUPREME COURT PROPERLY REFUSED TO REVIEW THE PETITIONERS' CLAIM THAT EVIDENCE OF THEIR SILENCE IN THE FACE OF ACCUSATION WAS ERRONEOUSLY ADMITTED WHERE THE CLAIM WAS NOT REVIEWED BECAUSE PETITIONERS DID NOT PRESENT AN ADEQUATE RECORD TO SUPPORT IT.

TABLE OF CONTENTS

Page

RULE INVOLVED ii

OPINION BELOW 1

JURISDICTION 1

STATEMENT 1

ARGUMENT 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Barra v. Ridgefield Card & Gift Gallery Ltd., 194 Conn. 400, 480 A.2d 557 (1984) 10

Doyle v. Ohio, 426 U.S. 610 (1976) 5, 12

Edwards v. Arizona, 451 U.S. 477 (1981) 7, 8

Holloway v. Arkansas, 435 U.S. 475 (1978) 7

Jenkins v. Anderson, 447 U.S. 231 (1980) 12

Michigan v. Tyler, 436 U.S. 499 (1978) 10

State v. Thompson, 197 Conn. 67, 495 A.2d 1054 (1985) 10

Wolfe v. North Carolina, 364 U.S. 177 (1960) 9

Rules of Court

Conn. Practice Book § 3060D .10

RULE INVOLVED

Connecticut Rules of Court § 3060D

The supreme court may reverse or modify the decision of the trial court if it determines that the decision is clearly erroneous in view of the evidence and pleadings in the whole record.

If the supreme court deems it necessary to the proper disposition of the cause, it may remand the case for a further articulation of the basis of the trial court's decision.

It is the responsibility of the appellant to provide an adequate record for review.

OPINION BELOW

The opinion of the Connecticut Supreme Court (Pet. App. 2a-13a) is reported at 197 Conn. 666, ___ A.2d ___ (1985).

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on December 3, 1985. A motion to reargue was denied on December 20, 1985. The petition for a writ of certiorari was filed on February 18,1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATEMENT

Following a joint jury trial, the petitioners Barcomb and Tyler-Barcomb were convicted of impairing the morals of a child. Barcomb also was convicted of sexual assault in the second degree.

Both petitioners desired to be, and were, represented by one attorney at trial. The issue of potential conflict of interest arising from this joint representation was raised on three separate occasions prior to trial. (Pet. App. 22a-32a).

On July 24, 1982, the petitioners' first court appearance, the petitioners' attorney explained to the court that he had gone over possible conflicts of interest with the petitioners and that they were satisfied with the dual representation. On October 2, 1981, when the petitioners' entered their pleas, the trial court inquired again as to the propriety of joint representation. Barcomb stated at that time that he understood that he was constitutionally entitled to competent representation and

that he saw no conflicts. On March 2, 1982, immediately before jury selection, the issue of joint representation was once again raised. On that day, the state's attorney went over in detail possible conflicts of interest including evidence which indicated that Tyler-Barcomb may have been passive due to the threats of Barcomb. The trial court then went over the possible conflicts of interest with the petitioners and inquired as to whether they understood the dangers of joint representation. They responded that they understood and that they were satisfied with joint representation. The court inquired still further and asked if they understood that they were waiving their rights to separate representation. They

both responded affirmatively and stated that they wanted the one attorney to represent them both. (Pet. App. 6a-7a)

During trial, two Connecticut State Troopers testified regarding a meeting they had with the petitioners prior to their arrest. The petitioners raised no objections to this testimony at trial.

On appeal to the Connecticut Supreme Court, the petitioners claimed that the trial court failed to give them an adequate warning as to the potential for conflict of interest arising from joint representation. They also claimed that the troopers' testimony had been erroneously admitted, as it revealed that the petitioners were silent in the face of accusation after being warned of

their right to remain silent, in violation of Doyle v. Ohio, 426 U.S. 610 (1976).

Regarding the petitioners' first claim, the Connecticut Supreme Court found that the record established that the petitioners knowingly and intelligently waived their right to separate counsel.

The Connecticut Supreme Court also found that, although review of the petitioners' claim invoking Doyle v. Ohio, supra, was not precluded by their failure to raise it at trial, it was precluded by the absence of an adequate record for review. The Supreme Court stated:

> The record in this case . . . is unclear as to whether the defendants have made out a viable fifth amendment claim. . . . Because the testimony of the two state police officers in this case was sparse and disjointed, it is impossible

> to tell whether the defendants were given their Miranda rights before or after they stated that they did not wish to speak with the officers. Thus, we are unable to tell from this record whether under Doyle and Jenkins there has been any deprivation of a fundamental constitutional right. It is incumbent upon an appellant to ensure that we are provided with an adequate record to review the claims of error . . . We will not presume error.

State v. Tyler-Barcomb, 197 Conn. at 675-76, Pet. App. at 11a-12a.

The petitioners' convictions were unanimously affirmed by the Connecticut Supreme Court which subsequently denied, without further opinion, their motion to reargue.

ARGUMENT

1. The petitioners initially claim that the trial court's instructions and inquiries regarding their desire to be represented by on attorney were insufficient to form the basis for a knowing and intelligent waiver of their sixth amendment rights.

The issue of whether codefendants may appropriately be represented by one attorney has been resolved by this Court in Holloway v. Arkansas, 435 U.S. 475 (1978). Similarly, the general issue of what action is necessary to constitute a knowing and intelligent waiver of Sixth Amendment protections has received extensive consideration by this Court. See, e.g., Edwards v. Arizona, 451 U.S. 477 (1981). The petitioners do not suggest that this case involves any

unique circumstances removing it from the ambit of established case law pertaining to the knowing and intelligent waiver of sixth amendment rights. Furthermore, as demonstrated by the petitioners' failure to cite any case law apart from two Connecticut Supreme Court decisions, the issue they raise is not a legal question on which various courts have divided.

In Edwards v. Arizona, supra, 451 U.S. at 482, the existence of a knowing and intelligent waiver was found to depend in each instance "upon the particular facts and circumstances surrounding that case." The petitioners do not suggest that the Connecticut Supreme Court applied an erroneous standard for determining waiver in this case; rather, they contest the court's

conclusion that the facts were sufficient to demonstrate that they understood the risks involved in joint representation.

Consideration of the petitioners' claim would add nothing of precedential value to Sixth Amendment jurisprudence and would result in the expending of this Court's resources to resolve a question wholly dependent on a unique factual context. See Wolfe v. North Carolina, 364 U.S. 177, 196 (1960). The claim does not warrant further review.

2. The petitioners' second claim is that the Connecticut Supreme Court's determination that the record was inadequate for review of their fifth amendment claim was incorrect.

Under Connecticut case law and rules of court, the state Supreme Court

is not bound to consider a claim of error which is not supported by an adequate record. It was the petitioners' burden to ensure that the Connecticut Supreme Court was provided with an adequate record to support their Fifth Amendment claim. State v. Thompson, 197 Conn. 67, 81, 495 A.2d 1054 (1985); Barra v. Ridgefield Card & Gift Gallery, Ltd., 194 Conn. 400, 407, 480 A.2d 557 (1984); Connecticut Rules of Court § 3060D. The Connecticut Supreme Court's refusal to consider a claim which is not supported by an adequate factual record rests on independent and adequate state grounds which preclude further review by this Court. Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978).

Furthermore, as the petitioners now concede, their constitutional claim

depends on the existence of two meetings between the state troopers and the petitioners, one on June 13, 1981 and one on June 15, 1981. Petition at 15-16. The Connecticut Supreme Court found, however, that only the June 15 meeting occurred.[1] State v. Tyler-Barcomb,

---

[1] The Connecticut Supreme Court also found that the testimony relating to that meeting was so "sparse and disjointed" as to render any conclusion regarding the chronology of events impossible. The petitioners now concede that viewed separately, the testimony of each trooper is ambiguous as to whether the petitioners' refusal to comment occurred before or after they were given Miranda rights. (Petition at 15-16). They claim, however, that it is "extremely clear" from the transcript that two separate meetings occurred. Neither trooper, however, testified that two meetings occurred. Trooper Hardell described a meeting, which he said occurred June 13, at which the petitioners and Troopers Hardell and Heroux were present. T. at 200-201. Trooper Heroux testified that she did not meet with the petitioners on June 13, but described a June 15 meeting involving both troopers and the petitioners. T. at 263-64. Trooper Heroux's description of the "June 15 meeting" and Trooper Hardell's description of the "June 13 meeting" were quite similar. T. at 201-202; 263-264.

197 Conn. at 675; Pet. App. at 11a. The resources of this Court ought not to be spent in resolving a purely factual dispute which would add nothing either to the scope of the holdings in Doyle v. Ohio, 426 U.S. 610 (1976) and Jenkins v. Anderson, 447 U.S. 231 (1980), or to Fifth Amendment jurisprudence generally.[2]

---

[2] If this Court were to grant review on this issue, the State assumes it would limit its consideration to the question of whether the Connecticut Supreme Court was required to review the claim. If the claim were found to be reviewable, the State further assumes this Court would remand the case to the Connecticut Supreme Court to consider the merits. Accordingly, the State does not address the merits of the Doyle claim.

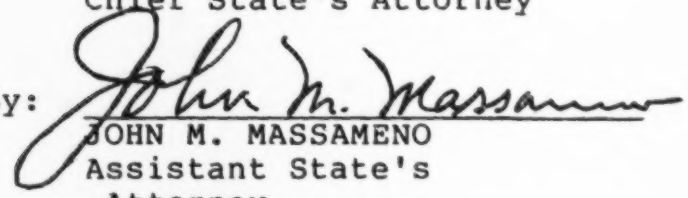
CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THE RESPONDENT
STATE OF CONNECTICUT

JOHN J. KELLY
Chief State's Attorney

By: 
JOHN M. MASSAMENO
Assistant State's Attorney
Senior Appellate Attorney
Appellate Unit
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373

SUSAN C. MARKS
Deputy Assistant State's Attorney
Appellate Unit
Office of the Chief State's Attorney